THE LAW SCHOOL.

LECTURE NOTES.

[These notes were taken by students from lectures delivered as part of the regular course of instruction in the School. They represent, therefore, no carefully formulated statements of doctrine, but only such informal expressions of opinion as are usually put forward in the class-room. For the form of these notes the lecturers are not responsible.]

THE STATUTE OF FRAUDS, SECTION 17. — (*From Professor Thayer's Lectures.*) — It has been said [1] that the Statute of Frauds was the result of "a case of frightful perjury;" but this is quite too trivial an explanation for so comprehensive and elaborate a piece of law reform. Probably it was an afterclap of the Commonwealth — a period full of ideas that went to the root of things, in law as well as in politics. This spirit survived the Restoration, and at the beginning of the reign of Charles II. committees were appointed to continue the endeavors after reform which had been carried forward in the time of the Commonwealth. Finch (Lord Nottingham) was on one of the committees, and these labors culminated in the Statute of Frauds. To the far-reaching propositions of legal reform made in the Commonwealth, and Sir Matthew Hale's connection with them, you may find a clue in a valuable paper in 3 Juridical Society Papers, 567, 597, and in 6 Somers's Tracts, 177-245. It is Hale and Nottingham who are generally credited with the chief hand in bringing out the Statute of Frauds.

We may fairly conjecture that the condition of the law at this time, as to proof of matters of fact, may well have had an important influence. In 1670, about six years before the statute, Bushell's case [2] had put an end to the old mode of restraining jurors by fines and imprisonment; and the attaint was no longer workable. Yet Bushell's case expressly recognized the old character of the jury as still existing, and allowed their rightful power to decide cases on their own knowledge without any evidence at all, and in disregard of any that might have been given. A method of checking jurors in the exercise of this power by granting new trials had indeed begun, but it was a novelty and was not worked out till later. This was, of course, a most unsatisfactory state of affairs, against which the statute appears to furnish protection, in a great variety of cases, by requiring a particular kind of pre-appointed form, not merely as a necessary kind of evidence to submit to a tribunal as their basis of inference, but as constituting a prerequisite ground of action, or, in some cases, an optional defence.

This exclusion, in certain cases of casual oral evidence and requirement of pre-constituted evidence in the shape of a writing, is the most conspicuous and characteristic feature of the Statute of Frauds. But it is by no means its only method or its only aim, as is shown by an examination of the whole instrument. Sections 10, 11, 12, 15, 16, 18 illustrate its wider scope. It is a various and most comprehensive piece of work.

There is an important and obvious difference between section 4 and section 17, in that the former is satisfied by a memorandum

[1] For instances see 4 Kent's Commentaries, 517; *Ladd's Will*, 60 Wis. 187; s. c.; 4 Gray's Cas. Property, 347.
[2] Vaughan, 135.

in writing only, whereas, in section 17, a writing is one of various alternatives. A comparison of these alternatives ("accept part of the goods so sold and actually receive the same, or give something in earnest to bind the bargain, or in part of payment"), with the things named in our old books as the badges of a completed transaction of sale (Glanvil, Book x. ch. 14; Bracton, 61 *b*), shows, not so much a close resemblance, as substantial identity. The old writers speak of payment (wholly or in part), earnest, and *traditio*. What the expression "acceptance and actual receipt" in section 17 means is a matter still in debate; but the conjecture is more than probable that the writer of the section meant to indicate in an emphatic way the old *traditio*. Apart from the writing, then, the alternatives of section 17, being of equal operation with a writing, appear to correspond to the old common law emblems of an executed transaction of sale; for by the common law, though the power of two persons was always recognized to pass and receive title at once by parol, if that were their intention, such an intention was not supposed to exist without some of these badges of a completed sale. As these requisites were the marks of a sale as distinguished from an agreement to sell, it is not unnatural that section 17 should have been formerly supposed to apply to executed transactions only. There is, indeed, considerable reason to think, as an original question, that such was the intention of the drawers of the statute, clearly as the interpretation is now settled to the contrary. Observe that executory contracts of sale are included within the provision as to contracts not to be performed within a year; and that the maxim *noscitur a sociis* would put upon section 17 the interpretation of meaning an executed sale, because that part of the statute is occupied with devises, trusts, judgments, and the like — things that operate as conveyances and carry title.

It is very important to take a general view of the Statute of Frauds, so as to avoid the two narrow interpretation frequently put upon it; to escape, for example, saying, with Lord Campbell, in *Morton* v. *Tibbett* (15 Q. B. 428, 431), that "acceptance under the statute is merely instead of a memorandum." It might be said with as much truth that a memorandum is merely instead of acceptance; the separate requirements of section 17 are perfectly distinct, and each stands on its own footing. The considerations applicable to one may be inapplicable to another.

RECENT CASES.

[These cases are selected from the current English and American decisions not yet regularly reported, for the purpose of giving the latest and most progressive work of the courts. No pains are spared in selecting *all* the cases, comparatively few in number, which disclose the general progress and tendencies of the law. When such cases are particularly suggestive, comments and references are added, if practicable.]

BAILMENT — NEGLIGENCE — COLLATERAL SECURITY. — A bank is not a gratuitous bailee of collateral security, but is responsible for the want of reasonable and ordinary care in its custody. Where it appears that no record or account of such securities was kept, and no examination in relationship thereto was made, except once in six months, a lack of ordinary care is shown. *Ouderkirk* v. *Central Nat. Bank*, 23 N. E. Rep. 875 (N. Y.).